No. 97 634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN; JEFFREY A. BEARD, Ph.D.; JEFFREY K. DITTY; DOES NUMBER 1 THROUGH 20 INCLUSIVE,

Petitioners,

v.

RONALD R. YESKEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: October 8, 1997

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43 pp

QUESTION PRESENTED

Does the Americans with Disabilities Act apply to inmates in state prisons?

LIST OF PARTIES

Respondent, Ronald R. Yeskey, filed this action against the Commonwealth of Pennsylvania, Department of Corrections; Joseph D. Lehman, in his former capacity as Secretary of the Department; Jeffrey A. Beard, in his former capacity as the Superintendent at the State Correctional Institution at Camp Hill; and Jeffrey K. Ditty, in his capacity as Director of the Central Diagnostic and Classification Center at the State Correctional Institution at Camp Hill.

Joseph D. Lehman has been succeeded by Martin F. Horn. The current Superintendent at the State Correctional Institution at Camp Hill is Kenneth Kyler.

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DOES NUMBER 1 THROUGH 20 INCLUSIVE,
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v.

RONALD R. YESKEY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, which reversed an order of the United States District Court for the Middle District of Pennsylvania dismissing this action pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Third Circuit is reported at 118 F.3d 168 (3d Cir. 1997) and is reprinted in Appendix 1a. The opinion and order of the United States District Court for the Middle District of Pennsylvania are not reported but are reprinted in Appendix 14a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was filed on July 10, 1997, and this petition for writ of certiorari has been filed within ninety days of that date. This Court has jurisdiction to review the decision of the Third Circuit pursuant to 28 U.S.C. § 1254(1) (1997).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution of the United States provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X

The Fourteenth Amendment to the Constitution of the United States provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Further, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 provides, in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency[.]

STATEMENT OF THE CASE

Respondent Ronald R.Yeskey was a Pennsylvania prisoner declared medically ineligible for admission to a motivational boot camp[1] because of his history of hypertension, despite the sentencing judge's recommendation. In December 1994, Yeskey filed suit in district court, alleging that the Pennsylvania Department of Corrections' refusal to place him in the program violated his rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, the Fourteenth Amendment, and the Pennsylvania Constitution.

The United States District Court for the Middle District of Pennsylvania dismissed Yeskey's complaint, holding that the ADA was inapplicable to state prisons and inmates. The Third Circuit Court of Appeals reversed. The court determined that the ADA's all-encompassing language concerning "services, programs, or activities" included "those that take place in prisons" and that its definition of a "public entity" also included a

1. The motivational boot camp is a program to which certain inmates may be assigned by the state Department of Corrections to serve their sentences. The boot camp provides rigorous physical activity, intensive regimentation and discipline, work on public projects and other treatment. Pa. Stat. Ann. tit. 61, § 1123 (West Supp. 1997). Pursuant to statute, placement of inmates in the boot camp is discretionary with the Department of Corrections. *Id.* § 1126. Although an inmate may be identified as eligible for boot camp placement by the sentencing judge, no inmate has a right to such placement. *Id.* § 1126(d). Upon successful completion of the six months incarceration, the inmate is released on parole for intensive supervision as determined by the Pennsylvania Board of Probation and Parole. *Id.* § 1127.

state or local correctional facility or authority. *Yeskey v. Pennsylvania Dep't of Corrections,* 118 F.3d 168, 170 (3d Cir. 1997). The court further concluded that because Congress clearly expressed its intention, in the ADA, to abrogate the states' constitutionally-guaranteed immunity, Congress could alter the usual constitutional balance between the states and the federal government. *Id.* at 173.

REASONS FOR GRANTING THE WRIT

The courts of appeals cannot agree on whether Congress ever intended the ADA to apply to management of disabled state prisoners; and if so, whether Congress has the power to dictate how such an essential state function will be handled. The answers to these questions significantly impact on every prison system in this country. Thus, it is essential for the Court to grant certiorari.

This Court has repeatedly emphasized that the federal government must refrain from unnecessary intrusion into state prison affairs and must afford appropriate deference and flexibility to state prison officials. *See Lewis v. Casey,* 116 S. Ct. 2174, 2185 (1996) (if prison administrators are to make the difficult judgments concerning institutional operations, they must be permitted to exercise wide discretion within the bounds of constitutional requirements); *Sandin v. Conner,* 515 U.S. 472, 482 (1995)(federal district courts must "afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); *Turner v. Safley,* 482 U.S. 78, 84-85 (1987)(where state penal institutions are involved, federal courts have a further reason for deference to the appropriate authorities).

The Third Circuit has now joined the Seventh and Ninth Circuits in holding that the ADA applies to state prison operations, whereas the Fourth and Tenth Circuits have reached exactly the opposite conclusion. *See Yeskey,* 118 F.3d at 172 (following *Crawford v. Indiana Dep't of Corrections,* 115 F.3d 481 (7th Cir. 1997) and *Duffy v. Riveland,* 98 F.3d 447 (9th Cir. 1996)). *Accord Armstrong v. Wilson,* No. 96-16870, 1997 WL 525521 (9th Cir. Aug. 27, 1997); *Clark v. California,* No. 96-16952, 1997 WL 525518 (9th Cir. Aug. 27, 1997). Contrast *Torcasio v. Murray,* 57 F.3d 1340, 1344-46 (4th Cir. 1995)(ADA's applicability to state prisons is not clearly established), *cert. denied,* 116 S.Ct. 772 (1996) and *White v. Colorado,* 82 F.3d 364, 367 (10th Cir. 1996)(ADA does not apply to inmates within a prison setting).

In this case, the Third Circuit criticized the reasoning of the Fourth and Tenth Circuits as "seriously flawed." *Yeskey,* 118 F.3d at 172. Just days ago, the Fourth Circuit countered by characterizing the Third Circuit's legal analysis as "interpretive gymnastics." *Amos v. Maryland Dep't of Pub. Safety and Correctional Services,* No. 96-7091, 1997 WL 581652, at *14 (4th Cir. Sept. 22, 1997).

After a painstaking examination of its decision in *Torcasio,* the Fourth Circuit remained steadfastly convinced that the ADA does not apply to prisons and that opinions to the contrary are unconvincing:

> Nothing in the opinions of those courts holding to the contrary even begins to refute the careful analysis we undertook in Torcasio. In reaching the conclusion that these Acts do not apply, and could not possibly be applied in the context of prison facilities, we are (and we believe that the Supreme Court will ultimately find itself) persuaded in no small measure by the extraordinarily circuitous statutory analyses which those courts reaching the contrary conclusion have undertaken and the considerable extra-interpretive energies that those courts have been forced to expend in order to limit the systemic chaos that would otherwise have followed on their holdings that these statutes apply to the Nation's myriad state prisons.

Id. at *1. Clearly, the circuits sharply disagree on two critical questions: In enacting the ADA, did Congress intend to dictate the states' management of disabled prisoners; and if so, does the Fourteenth Amendment give Congress that power?

A. There is a fundamental disagreement between the circuit courts of appeals about whether Congress intended the ADA to apply to state prisoners.

Title II of the ADA is written in broad, non-specific language. It states, in pertinent part:

> [N]o qualified individual with a disability shall, by reasons of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132 (1997). Congress has directed that Title II of the ADA be interpreted in a manner consistent with § 504 of the Rehabilitation Act. According to § 504, the definition of program or activity includes all of the operations of a department, agency, or other instrumentality of a state government.

Like the Seventh and Ninth Circuits, the court below held that the broad definition of "programs and activities" includes prison operations. *Yeskey,* 118 F.3d at 170. *Accord Crawford,* 115 F.3d at 483; *Duffy v. Riveland,* 98 F.3d at 455. In contrast, the Fourth Circuit stated that only a superficial reading of the statutes would support that conclusion. *Amos,* 1997 WL 581652, at *8 (quoting *Torcasio,* 57 F.3d at 1344.) However, the language of the ADA does not specifically include or exclude state prisons or prisoners; indeed, the very breadth of the statutory language renders it ambiguous. *Id.* at *18.[2]

Thus, the Fourth Circuit's refusal to apply the ADA to state prisons was grounded on an ordinary rule of statutory construction: Where Congress intends to alter the federal-state balance, or invade an essential state function, it must do

2. In fact, the ADA's introductory language suggests the exclusion of prisoners and of prisons, rather than their inclusion. The goals regarding disabled individuals are "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" so that the disabled can "pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(8) and (9) (1997). Without question, prison is hardly such a free society. Amos, 1997 WL 581652, at *15.

so in unmistakable terms. *Id.* at *6; *Torcasio,* 57 F.3d at 1344 (citing *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 65 (1989); *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242 (1985); and *Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 99 (1984)). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass,* 404 U.S. 336, 349 (1971).

Where application of a federal statute to a state would upset the normal constitutional balance of federal and state powers, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Amos,* 1997 WL 581652, at *6 (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991)). Therefore, the clear statement rule should be applied to any case which implicates "Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *Torcasio,* 57 F.3d at 1345 (citing Justice Souter's dissent in *United States v. Lopez,* 514 U.S. 549, 611 (1995)).

Repeated pronouncements of this Court indisputably demonstrate that the management of state prisons is, indeed, a core state function. It is difficult to imagine an activity in which a state has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. *Preiser v. Rodriguez,* 411 U.S. 475, 491-92 (1973). Indeed, it is elementary that prison maintenance is an essential part of a primary governmental function — the preservation of societal order through enforcement of criminal law. *Torcasio,* 57 F.3d at 1345 (quoting *Procunier v. Martinez,* 416 U.S. 396, 412 (1974)). Principles of comity and federalism apply with special force in the context of correctional facilities. *See Preiser,* 411 U.S. at 492 ("internal problems of state prisons involve issues so peculiarly within state authority and expertise"); *Procunier,* 416 U.S. at 405 ("where state penal institutions are involved, federal courts

have a further reason for deference to appropriate authorities"). Thus, the Fourth Circuit has correctly observed:

> That the management of state prisons is to be left to the states, as free as possible of federal interference, is confirmed by a long line of Supreme Court precedent. . . . [A]bsent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or to substitute their judgment for that of the trained penological authorities charged with the administration of such facilities.

Torcasio, 57 F.3d at 1345-46 (citing *Turner v. Safley,* 482 U.S. 78, 84-85 (1987); *Rhodes v. Chapman,* 452 U.S. 337, 349 (1981); *Bell v. Wolfish,* 441 U.S. 520, 562 (1979); *Procunier v. Martinez,* 416 U.S. 396 (1974); *Thornburgh v. Abbott,* 490 U.S. 401, 413-14 (1989); *Preiser v. Rodriguez,* 411 U.S. 475 (1973)).

In this case, the Third Circuit erroneously limited application of the plain statement rule. The court stated:

> [The Fourth Circuit's] extension of the clear statement rule was unwarranted. *Will, Atascadero,* and *Pennhurst* all involved instances in which there had been no express waiver or abrogation of the state's traditional immunity from suit, either by the state itself *(Pennhurst),* or by Congress *(Will, Atascadero).* Here, in contrast, both Section 504 and Title II of the ADA contain an "unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several states."

Yeskey, 118 F.3d at 172-73 (citation omitted). The lower court ignored the fact that, in *Gregory v. Ashcroft,* 501 U.S. 452 (1991), this Court applied the clear statement rule even though the case did not involve abrogation of the Eleventh Amendment.

With good reason, the Fourth Circuit has strongly criticized the interpretive analyses undertaken by the Third, Seventh, and Ninth Circuits because of the "extraordinary lengths

to which those circuits have gone to acknowledge the chaos that will likely result from their holdings." *Amos,* 1997 WL 581652, at *14. The Fourth Circuit explained:

> Specifically, while purporting to adhere to the text of the Rehabilitation Act and the ADA in determining that the statutes apply to state prisons, the Ninth Circuit — when forced to outline the meaning of "reasonable accommodation" and "undue burden" in the state prison context — has created extratextually, out of whole cloth, a statutory standard by engrafting the constitutional standard onto the statute; for their part, the Seventh and Third Circuits have transformed themselves into contortionists attempting to avoid the necessary consequences of their holdings by declining to outline the meaning of "reasonable accommodation" and "undue burden" in the prison context. Unlike the Ninth, Seventh, and Third Circuits, we decline to engage in such interpretive gymnastics.

Id. (internal citations omitted). As the Fourth Circuit pointed out, Congress simply has not spoken through the ADA with anywhere near the clarity and degree of specificity required to conclude that state prisons are subject to the act. *Id.* at *16.

The Third and Fourth Circuits agree that the legislative history of both the ADA and the Rehabilitation Act is silent on the applicability of those statutes to state prisons, but the courts disagree on the meaning of that fact. *Id.* The Third Circuit found this congressional silence to be a tacit approval of its conclusion that the ADA applies to state and local correctional facilities. *Yeskey,* 118 F.3d at 174 n.7. The Fourth Circuit strenously disagreed because "[i]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Amos,* 1997 WL 581652, at *17 (quoting *Girouard v. United States,* 328 U.S. 61, 69 (1946)).

Finally, the Fourth Circuit justifiably criticized the Third Circuit for deferring to Department of Justice regulations, 28 C.F.R. § 35.101 *et seq.,* as if the court were "interpreting a stat-

ute which has no implications for the balance of power between the Federal Government and the States." *Amos,* 1997 WL 581652, at *21 (citations omitted). Here, the implications for upsetting that balance of power are enormous, and the intrusiveness of the regulations makes this apparent. *Id.*

Deference to administrative regulations is particularly inappropriate in this case because it is not readily apparent that Congress even has the authority to regulate state prisons. *Id.* at *17. *See also Gregory,* 501 U.S. at 464 (noting the constraint on the Court's "ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause," and stating that "application of the plain statement rule thus may avoid a potential constitutional problem").

B. Whether Congress has the power to dictate how states will manage their disabled prisoners presents a fundamental question that must be addressed by this Court.

In this case, the Third Circuit recognized that prison administration is a core state function[3] and acknowledged the looming specter of federal-court management of state prisons which will result from application of the ADA. *Yeskey,* 118 F.3d at 174. Nevertheless, the court found the ADA applicable to state prison systems. In doing so, the Third Circuit ignored a basic principle of statutory construction: whenever possible, an act should be interpreted to reach a constitutional result. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council,* 485 U.S. 568, 575 (1988). Rather than blindly accepting the notion that Congress can dictate how disabled prisoners will be treated by the states, it is essential to consider the federal government's ability to make such an intrusion, no matter how well-intentioned.

3. Core state functions are protected from federal interference by the Tenth Amendment. EEOC v. Wyoming, 460 U.S. 226, 236 (1983). The Tenth Amendment provides that powers not delegated to the United States by the Constitution, nor prohibited by it, are reserved to the states. U.S. CONST. amend. X.

The ADA was ostensibly enacted under section 5 of the Fourteenth Amendment.[4] Whether Congress can use its enforcement power to dictate a state's management of its disabled prisoner population is very much open to question and should be resolved by this Court. In this instance, Pennsylvania does not contend that the ADA is unconstitutional, only that it cannot be constitutionally applied to state prisoners.

Congress's enforcement power is not unlimited. *Gregory v. Ashcroft,* 501 U.S. 452 (1991). It extends only to "enforc-[ing]" the provisions of the Fourteenth Amendment and is "remedial." *City of Boerne v. Flores,* 117 S. Ct. 2157, 2164 (1997). "The design of the Amendment and the text of section 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." *Id.* As this Court recognized in *Boerne,* it is not easy to discern the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law; however, the distinction exists and must be observed. *Id.*

The Third, Seventh, and Ninth Circuits have erroneously accepted the premise that Congress can pass disability legislation under section 5 of the Fourteenth Amendment. In *Boerne,* this Court recently struck down legislation in which Congress tried to use its section 5 enforcement power to expand the free exercise of religion beyond the scope of this Court's prior interpretation of that constitutional provision. The Court recognized that if Congress could define its own powers by altering the Fourteenth Amendment's meaning, "it

4. Congress also purportedly enacted the ADA pursuant to its power to regulate commerce. *See* 42 U.S.C. § 12101(b)(4) (1997). However, in *Printz v. United States,* 117 S.Ct. 2365 (1997), this Court held that federal Commerce Clause legislation may not conscript state officers to enforce a federal regulatory program. Application of the ADA to state prisoners would do precisely what *Printz* forbids: it would legislatively compel state officials to devote state resources to manage disabled prisoners in accordance with a federal regulatory scheme. "Such commands are fundamentally incompatible with our constitutional system of dual sovereignty." Printz, 117 S.Ct. at 1284.

is difficult to conceive of a principle that would limit congressional power." *Id.* at 2168.

Similarly, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court struck down legislation that would have extended the right to vote in state elections to anyone over the age of eighteen. In doing so, this Court concluded that the provision could not have been authorized under the Fourteenth Amendment because it addressed discrimination against persons who were not members of a protected class.

This Court should now declare that applying the ADA to state prisoners fails for the same reason: Disabled prisoners do not enjoy protected status, and the ADA cannot grant them federally-enforceable rights that exceed the constitution. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985)(for purposes of Fourteenth Amendment analysis, disabled individuals are similar to the aged in their experiences regarding discrimination, and this Court refused to extend special protections to them). *Id.* at 442.

If principles of federalism are to survive at all, this Court must prohibit excessive federal entanglement in the states' operation of their prisons. Congress may not violate other constitutional provisions to enforce those of the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966), and Congress should not be permitted to interpret national constitutional rights in an overly-expansive manner that frustrates this Court's responsibility to honor and safeguard the concept of federalism. Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 52 (1995).

With the exception of the Fourth Circuit, the courts of appeals have failed or refused to consider the serious impact that their decisons have on the concept of federalism. This Court should make clear that the ADA cannot be interpreted to infringe on the states' right to manage their prisons. Consequently, it is imperative for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Filed July 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7292

RONALD R. YESKEY,
APPELLANT

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS; JOSEPH D. LEHMAN; JEFFREY A. BEARD, PH.D.; JEFFREY K. DITTY; DOES NUMBER 1 THROUGH 20, INCLUSIVE,

APPELLEES

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 95-cv-02125)

Argued: January 31, 1997

Before: BECKER, ROTH, *Circuit Judges*, and BARRY, *District Judge*.*

(Filed July 10, 1997)

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*Honorable Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

Ronald R. Yeskey is a Pennsylvania prison inmate who was denied admission to the Pennsylvania Department of Correction's Motivational Boot Camp program because of a history of hypertension, despite the recommendation of the sentencing judge that he be placed therein.[1] Yeskey brought suit in the district court under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, alleging that his exclusion from the program violated that enactment.[2]

The district court dismissed Yeskey's complaint, Fed. R.

1. The Motivational Boot Camp Act, 61 P.S. §1121 *et seq.*, established a "motivational boot camp" to which certain inmates may be assigned by the Department of Corrections to serve their sentences for a period of six months. The boot camp provides rigorous physical activity, intensive regimentation and discipline, work on public projects, and other treatment. *Id.* §1123. Pursuant to statute, placement of inmates in the boot camp is discretionary, and, as such, no inmate has a right to such placement. *Id.* §1126(d). Upon successful completion of the six months incarceration, the inmate is released on parole for intensive supervision as determined by the Pennsylvania Board of Probation and Parole. *Id.* §1127.

2. Yeskey also asserted claims under 42 U.S.C. § 1983 and state law.

Civ. P. 12(b)(6), holding that the ADA is inapplicable to state prisons. The question of the applicability of the ADA to prisons is an important one, especially in view of the increased number of inmates, including many older, hearing-impaired, and HIV-positive inmates, in the nation's jails. *See generally* Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 Yale L. & Pol'y Rev. 49, 56-63 (1996). For the reasons that follow, we reverse.[3]

I.

Because this appeal turns on statutory construction, we begin with the text of the relevant statute, or more precisely, statutes. Although Yeskey only invoked the ADA, our discussion necessarily involves Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). Section 504, the first federal statute to provide broad prohibitions against discrimination on the basis of disability, applies only to programs and activities receiving federal financial assistance. Title II of the ADA, the broader statute, enacted in 1990, extends these protections and prohibitions to all state and local government programs and activities, regardless of whether they receive federal financial assistance. Congress has *directed* that Title II of the ADA be interpreted in a manner consistent with Section 504, 42 U.S.C. § 12134(b), 12201(a),[4] and all the leading cases take up the statutes together, as will we.

The substantive provisions of the statutes are similar. Section 504 provides in pertinent part:

3. By the time this case was listed for submission in this Court, only a short time remained on Yeskey's sentence, and we have unfortunately been unable to dispose of it until now. He may have been released (the parties have not informed us on this point). However, Yeskey's complaint included a claim for damages, and hence the case is not moot. We also note that, since boot camp placement commences contemporaneous with the execution of sentence, it would probably be nigh impossible to test improper exclusion from the boot camp program in federal court before the six month placement expires, likely creating a situation capable of repetition yet evading review, which excuses mootness.

4. *See generally* Robbins, *supra*, at 73-76.

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency[.]

29 U.S.C. § 794(a).

Title II of the ADA provides in pertinent part:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the Services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

The statutory definition of "[p]rogram or activity" in Section 504 indicates that the terms were intended to be all-encompassing. They include "*all* of the operations of — (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." 29 U.S.C. §794(b) (emphasis added). It is hard to imagine how state correctional programs would not fall within this broad definition.

Moreover, a word in a statute "must be given its 'ordinary or natural' meaning," *see Bailey v. United States*, 116 S. Ct. 501, 506 (1995), and the ordinary meanings of "activity" and "program" clearly encompass those that take place in prisons. "Activity" means, *inter alia*, "natural or normal function or operation," and includes the "duties or function" of "an organizational unit for performing a specific function." *Webster's Third New International Dictionary* 22 (1986). "Program" is defined as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal." *Id.* at 1812. Certainly, operating a prison facility falls within the "duties or functions" of local government authorities. Moreover, Title II's definition of a "public entity" clearly encompasses a state or local correctional facility or authority: "*any* department, agency,

> . . . or other instrumentality of a State or States or local government[.]" 42 U.S.C. § 12131(1)(B) (emphasis added).

This conclusion is bolstered by the Department of Justice (DOJ) regulations implementing both Section 504 and Title II of the ADA. These regulations were expressly authorized by Congress, 29 U.S.C. § 794(a); 42 U.S.C. §§ 12134(a), 12206, and, in view of Congress' delegation, the DOJ's regulations should be accorded "controlling weight unless [they are] 'arbitrary, capricious, or manifestly contrary to the statute.'" *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2418 (1995). The same is true of the preamble or commentary accompanying the regulations since both are part of the DOJ's official interpretation of the legislation. *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994). DOJ interprets both Section 504 and Title II of the ADA to apply to correctional facilities.

The regulations promulgated by DOJ to enforce Section 504 define the kinds of programs and benefits that should be afforded to individuals with disabilities on a nondiscriminatory basis. The regulations define "program" to mean "the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or *department of corrections*." 28 C.F.R. § 42.540(h) (1996) (emphasis added). The term "[b]enefit" includes "provision of services, financial aid or disposition (*i.e.*, treatment, handling, decision, sentencing, *confinement*, or other prescription of conduct)." *Id.* § 42.540(j) (emphasis added). The appendix to the regulations, attached to the Final Rule (45 Fed. Reg. 37620, 37630 (1980)), makes clear that services and programs provided by detention and correctional agencies and facilities are covered by Section 504. This coverage is broad, and includes "jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities." *Id.*

The appendix further provides that those facilities designated for use by persons with disabilities are "required to make structural modifications to accommodate detainees or prisoners in wheelchairs." *Id.* The DOJ regulations

applicable to federally conducted programs also make it clear that institutions administered by the Federal Bureau of Prisons are subject to Section 504. *See* 28 C.F.R. § 39.170(d)(1)(ii) (Section 504 complaint procedure for inmates of federal penal institutions); *id.* pt. 39, Editorial Note, at 675 (Section 504 regulations requiring nondiscrimination in programs or activities of the Department of Justice apply to the Federal Bureau of Prisons); *id.* at 676 (federally conducted program is "anything a Federal agency does").

The regulations promulgated under Title II of the ADA afford similar protections to persons with disabilities who are incarcerated in prisons, or otherwise institutionalized by the state or its instrumentalities, regardless of the public institution's receipt of federal financial assistance. The regulations state that the statute's coverage extends to "all services, programs, and activities provided or made available by public entities." *Id.* § 35.102(a). This broad language is intended to "appl[y] to anything a public entity does." *Id.* pt. 35, app. A, subpt. A at 456. As part of its regulatory obligations under Title II, the DOJ is designated as the agency responsible for coordinating the compliance activities of public entities that administer "[a]ll programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions." *Id.* § 35.190(b)(6). The preamble to the ADA regulations also refers explicitly to prisons, stating that, where an individual with disabilities "is an inmate of a custodial or correctional institution," the entity is required to provide "assistance in toileting, eating, or dressing to [that] individual[ ]." *Id.* pt. 35, app. A at 468.[5]

5. Moreover, the DOJ Title II Technical Assistance Manual specifically lists "jails and prisons" as types of facilities that, if constructed or altered after the effective date of the ADA (January 26, 1992), must be designed and constructed so that they are readily accessible to and usable by individuals with disabilities. *Title II Technical Assistance Manual* II-6.0000, II-6.3300(6). The design standards applicable to facilities covered by Section 504 and Title II also include specific provisions relating to correctional facilities. The DOJ Section 504 regulations adopt the Uniform Federal Accessibility Standards (UFAS), which apply to federal agencies and entities receiving federal financial assistance. 28 C.F.R. § 42.522(b). UFAS lists "jails, prisons, reformatories" and "[o]ther detention or correctional facilities" as institutions to which the accessibility standards apply. 41 C.F.R. subpt. 101-19.6, app. A at 150. Under Title II, covered entities building new or altering existing facilities may follow either UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG). 28 C.F.R. § 35.151(c); *see id.* pt. 36, app. A. Amendments to the ADAAG, adopted as an Interim Final Rule, effective December 20, 1994, by the Architectural & Transportation Barriers Compliance Board, include specific accessibility guidelines for "detention and correctional facilities." 59 Fed. Reg. 31676, 31770-72 (1994). The Department of Justice has proposed adoption of the interim final rule. *Id.* at 31808. The ADAAG is not effective until adopted by the DOJ.

In sum, Section 504 of the Rehabilitation Act, Title II of the ADA, and the specific provisions in the DOJ's regulations listing correctional facilities or departments as covered entities confirm that the Rehabilitation Act and the ADA apply to state and locally-operated correctional facilities.

II.

The weight of judicial authority also supports our conclusion that the ADA applies to prison programs. In *Crawford v. Indiana Department of Corrections*, ___ F.3d ___, 1997 WL 289101 (7th Cir. June 2, 1997), the Seventh Circuit held that Title II of the ADA applied to state prisons in the case of a blind, former state prisoner who sought damages resulting from his exclusion from a variety of programs, activities, and facilities at the prison that were routinely available to the prison's population, including educational programs, the library, and the dining hall. *Accord Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996); *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (holding Rehabilitation Act applicable).

Two circuits have questioned the applicability of Section 704 and Title II to prisons. *See Torcasio v. Murray*, 57 F.3d 1340, 1344-46 (4th Cir. 1995) (coverage of prisons by Section 504 and Title II not clearly established in qualified immunity context), *cert. denied*, 116 S. Ct. 772 (1996);

White v. State of Colorado, 82 F.3d 364, 367 (10th Cir. 1996) (neither ADA nor Rehabilitation Act applies to prison employment). In our view, these opinions are seriously flawed. The leading case in support of the Commonwealth's position is *Torcasio*, which was followed by the district court here, and so we focus our sights on that case.[6]

The Fourth Circuit in *Torcasio* acknowledged that the broad language prohibiting discrimination on the basis of disability in both statutes "appears all-encompassing," 57 F.3d at 1344. Nevertheless, the *Torcasio* court was reluctant to find either statute applicable to prisons because of the so-called "clear statement" doctrine, as set out in *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989):

> if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 . . . (1985); *see also, Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 . . . (1984).

Because it found the operation of prisons to be a "core state function," 57 F.3d at 1345, and because neither Section 504 nor Title II includes an express statement of its application to correctional facilities, the *Torcasio* court expressed its doubt that Congress had "clearly" intended either statute to apply to state prisons. *Id.* at 1346.

This extension of the clear statement rule was unwarranted. *Will*, *Atascadero*, and *Pennhurst* all involved instances in which there had been no express waiver or abrogation of the state's traditional immunity from suit, either by the state itself (*Pennhurst*), or by Congress (*Will*, *Atascadero*). Here, in contrast, both Section 504 and Title

6. *Torcasio* did not decide whether either Section 504 or Title II of the ADA applies to prisons; rather, it concluded that such coverage was not clearly established at the time of the events at issue, and that the individual defendants in that case therefore were entitled to qualified immunity. In reaching its qualified immunity ruling, however, the *Torcasio* court discussed the reach of the two statutes at length, and expressed its doubt that either applied to prisons.

II of the ADA contain an "unequivocal expression of congressional intent to overturn the constitutionally guaranteed immunity of the several states." *Pennhurst*, 465 U.S. at 99 (internal quotation marks and citation omitted); *see* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act."); *id.* § 12202 ("A State shall not be immune under the eleventh amendment . . . from an action in Federal or State court of competent jurisdiction for a violation of [the ADA].").

To be sure, when "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 461 (1991) (internal quotation marks and citations omitted). This requirement, however, is a "rule of statutory construction to be applied where statutory intent is ambiguous." *Id.* at 470. It is not a warrant to disregard clearly expressed congressional intent.

Torcasio's statement that Congress must specifically identify state or local prisons in the statutory text, if it wishes to regulate them, was expressly disavowed by the Supreme Court in *Gregory*. *See id.* at 467 ("This does not mean that the Act must mention judges explicitly."). Congress need only make the scope of a statute "plain." *Id.* And Congress has done that here. Both Section 504 and Title II speak unambiguously of their application to state and local governments and to "any" or "all" of their operations. In light of the clear and all-encompassing language of both statutes, there is no basis for requiring Congress to have detailed which of the many important components of state and local governments were to be included in the terms "any" and "all."

In *Crawford*, *supra*, just as in this case, the state relied on the fact that prison administration was a "core" state function in arguing that the clear statement rule was triggered. Judge Posner responded most forcefully:

> Prison administration is indeed a core function of state government, as is education. But the state's concession

> that the Americans with Disabilities Act applies to the prison's relations with its employees and visitors, as well as to the public schools, suggests that the clear-statement rule does not carry this particular core function of state government outside the scope of the Act. We doubt, moreover, that Congress could speak much more clearly than it did when it made the Act expressly applicable to all public entities and defined the term "public entity" to include every possible agency of state or local government. Maybe there is an inner core of sovereign functions, such as the balance of power between governor and state legislature, that if somehow imperiled by the ADA would be protected by the clear-statement rule, *cf. Gregory v. Ashcroft*, *supra*, 501 U.S. at 461-63; but the mere provision of public services, such as schools and prisons, is not within that inner core.

Crawford, __ F.3d __, 1997 WL 289101, at *4. We agree.

III.

Despite the Commonwealth's contention to the contrary, moreover, *prisoners* (in contrast to *prisons*) are not excluded from coverage because Section 504 and Title II protect only "qualified individual[s] with a disability." That term is defined in Title II to mean:

> an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2). The terms "eligibility" and "participation" do not, as *Torcasio* stated, *see* 57 F.3d at 1347, "imply voluntariness" or mandate that an individual seek out or request a service to be covered. To the contrary, the term "eligibility" simply describes those who are "fitted or qualified to be chosen," without regard to their own wishes. *See Webster's Third New International Dictionary*, *supra* at 736.

Judge Posner addressed a related aspect of the case quite incisively:

> It might seem absurd to apply the Americans with Disabilities Act to prisoners. Prisoners are not a favored group in society; the propensity of some of them to sue at the drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off. But . . . there is another side to the issue. The Americans with Disabilities Act was cast in terms not of subsidizing an interest group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining hall, unless allowing him to use the dining hall would place an undue burden on prison management.

Crawford, __ F.3d __, 1997 WL 289101, at *5 (citations omitted). We agree here as well.

In sum, in enacting the ADA, Congress "invoke[d] the sweep of [its] authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4). The "critical areas" in which "discrimination against individuals with disabilities persists" were set forth in the statute, and include "institutionalization." *Id.* § 12101(a)(3).

Thus, if the plain words of a statute are to guide the courts in interpreting it, then both statutes must be held to apply to state and local correctional facilities.[7] Essentially, the Commonwealth is asking us to amend the statute, something we cannot do.

IV.

The foregoing discussion establishes that the ADA applies to Yeskey's claim. His claim for injunctive relief is, apparently, moot in view of the impending (or actual) completion of his prison term. His claim for damages will turn, presumably, on whether he should (or would) have been admitted to the boot camp. Even with the ADA applicable, Yeskey might not have been admitted for a number of reasons, which will have to be explored on remand.

The Commonwealth has invoked the specter of federal court management of state prisons:

> Application of the ADA to internal prison management would place nearly every aspect of prison management into the court's hands for scrutiny simply because an inmate has a disability. *See Pierce v. King*, 918 F. Supp. 932, 941 (E.D.N.C. 1996). For instance, if the ADA applies to routine prison decisions, it is not unfathomable that courts will be used to reconstruct cells and prison space, to alter scheduling of inmate movements and assignments and to interfere with security procedures.

Brief at 15. Although these considerations do not override our conclusion that the ADA applies to prisons, our holding does not dispose of the controversial and difficult question whether principles of deference to the decisions of prison officials in the context of constitutional law apply to

7. We add that the legislative history does not inveigh against this conclusion. When the ADA was enacted in 1990, the Rehabilitation Act had been law for seventeen years and a number of cases had held it applicable to prisons and prisoners, yet Congress did not amend that Act or alter any language so as to extirpate those interpretations.

statutory rights. *See generally* Robbins, *supra*, at 94-97.[8] We are not sure of the answer, and need not address that question now for, at all events, we doubt that it will be germane in this case. We do, however, "flag" it for another day.

The judgment of the district court will be reversed, and the case remanded for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

8. *Turner v. Safley*, 482 U.S. 78 (1987), establishes a four-part "reasonableness" test for judicial deference to prison managment decisions in the face of constitutional challenges (usually under the Eighth Amendment). The first requirement is "a valid rational connection" between the regulation and the alleged governmental interest. The second inquiry is whether alternative means exist for inmates to exercise the right under consideration. The third issue is the effect that accommodation of the asserted right will have on security, administrative efficiency, prison staff, and the larger inmate population. The final prong of the test is whether an alternative means exists for prison officials to accomplish their objectives without infringing on inmates' rights. *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (reaffirmed the *Turner* standard with respect to alleged infringement of inmates' First Amendment right to free exercise of religion).

The Ninth Circuit has held that the *Turner* standard applies to statutory rights such as those created by the ADA. In *Gates v. Rowland*, 39 F.3d 1439 (9th Cir. 1994), the court reversed a lower court's ruling that denial of food-service positions to HIV-positive inmates discriminated against them impermissibly. Reasoning that, where constitutional protections bend, statutory privileges must too, the court deferred to the penalogical concerns asserted by prison officials. The Eighth Circuit disagrees. *See Pargo v. Elliott*, 49 F.3d 1355 (8th Cir. 1995)(*Turner* does not foreclose all heightened judicial review.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-95-2125
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	

MEMORANDUM

I. *Introduction and Background.*

The plaintiff, Ronald R. Yeskey, an inmate at SCI-Greensburg, Pennsylvania, has filed objections to the report of the magistrate judge which recommended that the defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) be granted. The named defendants are the Pennsylvania Department of Corrections, Joseph D. Lehman, the Department's Commissioner, Jeffrey A. Beard, the Superintendent at SCI-Camp Hill, Pennsylvania, and Jeffrey K. Ditty, the Director of the Central Diagnostic and Classification Center at Camp Hill. (John Doe defendants one through twenty have also been sued.)

The plaintiff filed this action alleging that the refusal to allow him into a prison boot camp program because of high

blood pressure violated his rights under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12165; his fourteenth amendment right to equal protection; his eighth amendment right (as guaranteed under the fourteenth amendment) to be free from cruel and unusual punishment; and his right to due process as guaranteed under Article I, § I of the Pennsylvania Constitution. The plaintiff invokes 42 U.S.C. § 1983 in connection with his federal claims. He seeks damages and declaratory and injunctive relief, including an injunction requiring the defendant to release the plaintiff from confinement on the date he would have been released if he had been allowed into the boot camp program.

Because we are dealing with a motion to dismiss, we must accept as true the factual allegations in the complaint and construe any inferences to be drawn from them in the plaintiff's favor. *See Kost v. Kozakiewicz,* 1 F.3d 176 (3d Cir. 1993). With this standard in mind, we set forth the background to this litigation, as the plaintiff alleges it.

In May 1994, the plaintiff was sentenced in state court after a guilty plea to eighteen to thirty-six months imprisonment. (Complaint, ¶ 9). The sentencing court recommended his placement in the state's boot camp program which would have allowed him to be released on parole if he successfully completed the six-month program. (*Id.*, ¶ 10). On July 1, 1994, while the plaintiff was housed at SCI-Camp Hill awaiting classification, he was refused entry into the boot camp program "due to a medical history of hypertension (on medication)." (*Id.*, ¶ 11). He was also refused entry into "any alternative program offering to disabled persons . . . the same benefits as the Motivational Boot Camp Program." (*Id.*, ¶ 12). He then filed suit, setting forth the causes of action noted above.[1]

II. *Procedural Background.*

The defendants moved to dismiss all of the claims. In regard to the ADA, they made two arguments. First, the plaintiff had no right under state law to admission to the program so even if he had not been denied entrance on the basis

1. The case was filed in the Western District of Pennsylvania but was transferred here on motion of the defendants.

of his high blood pressure, the plaintiff cannot establish that he would have been admitted to the program in any event. Second, the ADA does not require accommodation that would destroy the essential nature of a program. Since rigorous physical activity is essential to the boot camp program, plaintiff cannot be accommodated since his hypertension prevents him from being physically active. In regard to the equal protection claim, they argued that the decision to exclude him was a rational one based on his condition. In regard to relief under section 1983, they argued that the Department could not be sued because the eleventh amendment bars suit against the state and because the Department is not a "person" (using the language of the section) who can be sued under it. Finally, in regard to the state constitutional claim, they argued that we should not retain jurisdiction once the federal claims were gone and that, in any event, state law immunized all of the defendants from this claim.

In his report the magistrate judge recommended that the motion be granted. Noting that admission to the boot camp was discretionary with Department officials, he disposed of the ADA claim as follows:

> [W]hether or not the plaintiff is a qualified person with a disability pursuant to the ADA is of no moment, since it is well settled that a state prisoner, whether disabled, or not, does not have a protected liberty interest in matters of classification or particular custody status, and none is provided by the ADA or federal law. [citations omitted]. Moreover, an inquiry by this Court into matters of prison administration, such as classification or custody status would necessarily interfere with the administration's right to police its penal system. These administration (sic) determinations have consistently and correctly been left to the prison management's sound discretion.

(magistrate judge's report at pps. 5-6) (brackets added). The magistrate judge then found the equal protection claim deficient by reasoning that: (1) disabled persons are not a class protected by the clause; and (2) the defendants had not intentionally discriminated because they did not refuse him

entrance on the basis of his membership in a disfavored group but because of his high blood pressure. The magistrate judge next concluded that the eighth amendment claim was invalid because the eighth amendment only protects against the unnecessary and wanton infliction of pain and refusal of entry into the program does not satisfy this standard. The magistrate judge did not address the supplemental state constitutional claim.

The plaintiff then filed his objections which concentrate on the substance of his ADA claim. First, the plaintiff contends that the magistrate judge erred in dismissing the ADA claim on the basis that he cannot assert a constitutional right to participation in the boot camp program. Second, he objects that the magistrate judge erred in requiring a constitutional violation for a section 1983 claim because a violation of a federal statute, here the ADA, is all that is necessary.

In opposing the objections, the defendants argue for the first time that there is no ADA claim because the ADA does not apply to state prisons, relying on cases decided after the briefing of the motion to dismiss. They also contend that the section 1983 claim must fail because that claim requires either a federal constitutional or statutory violation and the plaintiff cannot establish either kind of violation here.

III. *Discussion.*

We will deal first with the defendants' threshold argument that the ADA does not apply to state prisons. The argument is based on *Little v. Lycoming County,* 912 F. Supp. 809 (M.D. Pa. 1996), a case decided by another judge of this court, and *Torcasio v. Murray,* 57 F.3d 1340 (4th Cir. 1995), *cert. denied sub nom. Torcasio v. Angelone,* ____ U.S. ____, 116 S.Ct. 772, 133 L.Ed.2d 724 (1996). We need only discuss *Torcasio* since *Little* simply adopts its reasoning.

It will be helpful to preface our discussion with the pertinent sections of Title II of the ADA. Section 12132 prohibits discrimination against the disabled and provides as follows:

> Subject to the provisions of this subchapter [Title III], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or

be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. S 12132 (brackets added).

Section 12131(l), the definitional section for Title II, defines a "public entity" as follows:

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government;

. . .

42 U.S.C. § 12131(l)(A) and (B)

In *Torcasio*, the Fourth Circuit stated that section 12131(l) did not cover state prisons. It therefore held on the issue before it, whether Virginia prison officials were entitled to qualified immunity, that the plaintiff prisoner's claim under Title II of the ADA was barred by this defense. In the Fourth Circuit's perception, section 12131(1)'s language, "when viewed in isolation, appears all-encompassing," 57 F.3d at 1344, but was actually too "broad" and "non-specific" to be able to say that it was "clearly establishe[d]" that the ADA applied to state prisons. *Id.* at 1346 (brackets added). Hence, the defendants could not be subjected to liability since qualified immunity protected them against all claims based on a violation of a federal right except those rights that were clearly established. *Id.* at 1343.

Although decided in the context of qualified immunity, *Torcasio* is relevant here because the court essentially reasoned that the ADA does not apply to state prisons. *See Little, supra,* (applying *Torcasio* in dismissing an ADA claim on the merits); *Staples v. Virginia Department of Corrections,* 904 F. Supp. 487, 490 n.1 (Mag. Judge E.D. Va. 1995) (relying on *Torcasio* in dismissing the ADA claim against one defendant and commenting that "with its ruling . . . the Fourth Circuit has all but held that, *per se,* the ADA does not apply to state prison facilities").

Despite the plaintiff's citation to other cases that have applied the ADA to state prisons, we have decided to follow *Torcasio* and *Little*. Based on this decision, we need not examine the plaintiff's objections.

We will issue an appropriate order.

/s/ William W. Caldwell

William W. Caldwell
United States District Judge

Date: April 9, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD R. YESKEY, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-95-2125
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants	:	

ORDER

AND NOW, this 9th day of April, 1996, upon consideration of the report of the magistrate judge, dated January 23, 1996, and the objections filed, and upon independent review of the record, it is ordered that:

1. The defendants' motion to dismiss is granted.

2. The plaintiff's federal claims are dismissed and his state constitutional claim is dismissed without prejudice to its filing in an appropriate state court.

3. The Clerk of Court shall close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

TEXT OF THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

42 U.S.C. § 12132 (1997)
(Title II of the ADA of 1990)

Section 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

29 U.S.C. § 794 (1997)
(Rehabilitation Act of 1978)

Section 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) **Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees.** No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) **"Program or activity" defined.** For the purposes of this section, the term "program or activity" means all of the operations of—

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 8801]), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) **Small providers; exceptions to existing facilities.** Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection [enacted March 22, 1988].

(d) **Standards applicable to complaints.** The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.